NEW YORK LAW SCHOOL

NYLS Law Review

Volume 39
Issue 1 *VOLUME XXXIX, Numbers 1 & 2, 1994*

Article 6

January 1994

ASSET FORFEITURE REFORM: A LAW ENFORCEMENT RESPONSE

Terrence P. Farley

ASSET FORFEITURE REFORM: A LAW ENFORCEMENT RESPONSE

TERRENCE P. FARLEY*

I will begin by looking at the purpose, the importance and the effects of asset forfeiture. The National District Attorneys Association has said that "[c]rime in America is a multi-billion dollar industry that has a devastating effect on legitimate economic enterprise by diverting money from lawful commerce while rewarding and financing ongoing illegal activity."[1] How then do we best attack crime? We take the profit out of it. Asset forfeiture alone destroys the money base necessary for the continuation of illegal enterprises and attacks the economic incentive to engage in organized criminal activity.[2] It also deters individuals from using their property to facilitate criminal activity.[3] Perhaps best of all, it rededicates the money from illegal activity to the public good.[4]

Why then does asset forfeiture always appear to be under attack? It seems to me that there has been a highly organized and apparently well-financed disinformation campaign that has led to a great deal of confusion in many quarters. Groups such as the American Civil Liberties Union often claim that asset seizure and forfeiture violate due process and that there are no procedural safeguards governing the ability of law enforcement officials to seize property.[5] Nothing could be further from the truth. It is difficult in this forum to discuss specific procedures, for

---

* Director, Division of Criminal Justice, New Jersey.

1. NATIONAL DIST. ATT'YS ASS'N, GUIDELINES FOR CIVIL ASSET FORFEITURE 1 (March 1993).

2. *See id.*; EXECUTIVE OFFICE FOR ASSET FORFEITURE, U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE DEPARTMENT OF JUSTICE ASSET FORFEITURE PROGRAM: FISCAL YEAR 1993, at 1 (1994) [hereinafter 1993 ANNUAL REPORT]; *see also* Sonia C. Jaipaul, *Asset Forfeiture: A Federal Prosecutor's View—Taking the Profit out of Crime*, 40 FED. B. NEWS & J. 176 (1993) (endorsing the federal asset forfeiture program and giving examples of how it removes economic incentives to criminal activity).

3. NATIONAL DIST. ATT'YS ASS'N, *supra* note 1, at 1; 1993 ANNUAL REPORT, *supra* note 2, at 1; *see also* Jaipaul, *supra* note 2, at 176-77 (discussing the deterrent effect of asset forfeiture).

4. NATIONAL DIST. ATT'YS ASS'N, *supra* note 1, at 1; *see* 21 U.S.C. § 881(e) (1988 & Supp. V 1993) (delineating how forfeited property can be disposed of by the government); 1993 ANNUAL REPORT, *supra* note 2, at 15.

5. *See* Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95 (1994) (article by an ACLU legislative counsel describing why civil forfeiture is a "morally and legally scandalous system").

they vary between the federal and state laws and even from state to state. Suffice it to say, however, that even under the least stringent civil forfeiture procedures, there are many basic safeguards for the individual, including notice to interest holders, a right to an impartial hearing, and the right to appeal.[6]

An article in *Criminal Justice*, a magazine of the American Bar Association, devoted about eight pages to defending federal forfeiture proceedings, explaining the law and how defense attorneys should handle these cases.[7] Contrary to most media articles, it actually explains how the federal forfeiture law provides an innocent-owner defense, and it discusses Department of Justice policies such as providing actual notice to lienholders in these cases.[8] Further, the American Bar Association and other organizations have held training conferences all over the country specifically dealing with how to defend asset forfeiture cases.[9] I doubt there would be such courses if there were no demand for them.

---

6. *See* 19 U.S.C. §§ 1607-1608 (1988 & Supp. V 1993) (setting forth the procedure by which a claimant obtains a judicial hearing); Executive Office for Asset Forfeiture, U.S. Dep't of Justice, Directive 93-4 (Jan. 15, 1993) (requiring written notice to interested owners of the seized property not later than 60 days from the date of seizure) [hereinafter DOJ Directive 93-4]. For examples of the implementing regulations of the various law enforcement agencies, see 8 C.F.R. § 274.10 (1994) (Immigration and Naturalization Service); 19 C.F.R. § 162.47 (1994) (United States Customs Service); 27 C.F.R. § 72.22(a)(6) (1994) (Bureau of Alcohol, Tobacco and Firearms). *See generally* DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 6.02 (Supp. 1994) (discussing procedures by which a claimant obtains a judicial hearing). For background on procedural due process, see Mathews v. Eldridge, 424 U.S. 319 (1976) (setting forth a three-part balancing test to determine if a particular administrative procedure violates due process); Goldberg v. Kelly, 397 U.S. 254 (1970) (applying procedural due process analysis to termination of welfare benefits and holding that hearing is required before a termination of benefits). For forfeitures of real property, a hearing must be held in advance of the forfeiture. United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (holding that the Due Process Clause of the Fifth Amendment requires the government to give owners of real property notice and an opportunity to be heard before a seizure of property pursuant to 21 U.S.C. § 881 can be made). *See generally* STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE: FEDERAL AND STATE PRACTICE §§ 3.01[2][f], 7.01-7.02 (1993 & Supp. 1994) (discussing the impact of *Good* on civil forfeiture proceedings).

7. Michael F. Zeldin & Jane W. Moscowitz, *Innocent Third Parties in Federal Forfeiture Proceedings: What are Their Rights?*, CRIM. JUST., Spring 1993, at 11.

8. *See id.*

9. The American Bar Association Criminal Justice Section held its second Civil Asset Forfeiture Training Conference in Miami during May 1992, and a similar training conference is scheduled in San Francisco for March 1995 as part of a conference on white collar crime. The National Association of Criminal Defense Attorneys held a forfeiture defense training conference in August 1993 in San Francisco.

In order for a law enforcement officer to arrest someone or to search someone's home, he or she must first establish probable cause.[10] Unless there are some emergent circumstances, the facts that lead the officer to believe there is probable cause are subject to the scrutiny of an independent judicial officer.[11] Those situations involve all of the potential ramifications of the criminal process, including the very liberty of our citizens.

Yet, when that same standard is applied to seize property alone, law enforcement and the statutes they work through are the butt of severe criticism.[12] One of law enforcement's main concerns in abandoning these standards is the safety and welfare of confidential informants.[13]

---

10. U.S. CONST. amend. IV (requiring that all government searches and seizures be reasonable and upon issuance of a warrant supported by probable cause). *See generally* Illinois v. Gates, 462 U.S. 213 (1983) (requiring an analysis of the totality of the circumstances to determine whether probable cause exists); Katz v. United States, 389 U.S. 347 (1967) (establishing the reasonable-expectation-of-privacy test to determine whether government activity rises to the level of a search or seizure); Mapp v. Ohio, 367 U.S. 643 (1961) (incorporating the Fourth Amendment protections against state governmental action via the Fourteenth Amendment); Johnson v. United States, 333 U.S. 10 (1948) (holding warrantless searches unreasonable per se).

11. *See* Mincey v. Arizona, 437 U.S. 385 (1978) (discussing exigent or emergent circumstances as an exception to the warrant requirement generally and in regard to the scene of a crime); United States v. Socey, 846 F.2d 1439 (D.C. Cir. 1988) (setting forth a standard for determining exigent circumstances after an arrest). For background on the emergent or exigent circumstances exception to the warrant requirement, see Maryland v. Buie, 494 U.S. 325 (1990) (allowing for a "protective sweep" of premises incident to arrest to secure the safety of police officers and others); Chimel v. California, 395 U.S. 752 (1969) (limiting the scope of the search to the rationale supporting the warrant exception); Terry v. Ohio, 392 U.S. 1 (1968) (recognizing the ability of police to "stop and frisk" without first establishing probable cause).

12. *See, e.g.*, Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War On Drugs*, 66 S. CAL. L. REV. 1389 (1993); George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653 (1991); Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274 (1992); Virginia A. Albers, Comment, *Is Greater Process Due?: United States v. Twelve Thousand, Three Hundred and Ninety Dollars ($12,390)*, 26 CREIGHTON L. REV. 841 (1993); Peter Petrou, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions*, 1984 DUKE L.J. 822.

13. Several courts have taken notice of the government's interest in protecting informants. *See* United States v. 124 E. N. Ave., 651 F. Supp. 1350, 1355 (N.D. Ill. 1987) (noting that if disclosing the identity of an informant would jeopardize the safety of the informant, then the hearing to determine probable cause to forfeit real property can be held *ex parte*); United States v. Certain Real Estate Property, 612 F. Supp. 1492 (S.D. Fla. 1985) (same).

Fortunately, the identities of such informants often can be protected under the present system; therefore, informants need not be terrified of violent reprisals designed to silence their testimony. Under some statutes, once probable cause has been established, the claimant has the burden to prove, by a preponderance of evidence, the affirmative defense that the property is not subject to forfeiture.[14] This is the very same standard used in most property and other civil cases—nothing more, nothing less.[15]

Congressman Henry J. Hyde's bill purports to shift the burden of proof to the government.[16] In fact, the government already has the burden. The standard of proof, however, is probable cause.[17] What the Hyde bill really does is change the standard to that of clear and convincing proof. If one examines the history of this standard, it becomes clear that it was historically adopted in fraud cases wherein the courts, to avoid fraudulent suits, required claimants to prove their claims by clear and convincing evidence.[18] This standard appears to be an insult to law enforcement. The standard implies malice on the part of law enforcement by imposing a higher standard of proof for forfeiture than is required in other civil property cases. Who is in a better position than the alleged owner to show that the property was not used illegally, or that it was not proceeds of criminal activity?

What exactly is it that the government must show by way of probable cause? What property exactly is subject to this procedure? Is it just any property at some law officer's whim? Of course it is not. Put most simply, in order for the government to seize property, the property must be either the profits of or the means to facilitate or commit certain designated crimes.[19] I believe, contrary to what the detractors say, most Americans agree that the government should have the ability to seize and forfeit the tank and dump trucks of those illegally polluting our air, ground and water supplies; the trucks, boats and vans of illegal alien smugglers; the warehouses, wirerooms, brothels and pornography shops

---

14. *See, e.g.*, 19 U.S.C. § 1615 (1988 & Supp. V 1993); 21 U.S.C. § 881(a)(4), (7) (1988).

15. *See* MCCORMACK ON EVIDENCE § 339(a) (John W. Strong ed., 4th ed. 1992); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 7.6 (3d ed. 1985).

16. H.R. 2417, 103d Cong., 1st Sess. § 4 (1993) (amending 19 U.S.C. § 1615).

17. 19 U.S.C. § 1615.

18. *See* 9 J. WIGMORE, ON EVIDENCE IN TRIALS AT COMMON LAW § 2498, at 424-31 (James H. Chadbourn ed. 1981) (discussing the appropriate standard at various civil proceedings, including claims of fraud); Oriel v. Russell, 278 U.S. 358 (1928) (applying the clear and convincing standard to a fraud case).

19. *See, e.g.*, 21 U.S.C. § 881(a) (1988 & Supp. V 1993) (dealing with crimes involving controlled substances).

of organized crime groups; the "chop-shops" of car theft rings; the buildings, laboratories, lands and vehicles of drug distributors and the monies used to fuel these illegal enterprises.

The very statutes that allow these forfeitures came under severe attack by the National Association of Criminal Defense Lawyers (NACDL), one of the primary organizations supporting Congressman Hyde's bill, when its representatives testified before Congressman John Conyers' subcommittee in support of the Hyde bill and Congressman Conyers' even more expansive proposed restrictions.[20] One of the detractors' main concerns, one that a portion of Congressman Hyde's proposed bill specifically addresses, is the assignment of counsel.[21] To my knowledge, nowhere in the history of Anglo-Saxon law is there a provision for the appointment of counsel in a civil property case. In fact, the suggestion that there is an absolute right to counsel has been reviewed and rejected by various state and federal courts.[22] It is ironic, then, to note that Congressman Hyde's bill not only would grant the right to appointed counsel,[23] but also that the money to pay for counsel would come from the government's own asset forfeiture fund.[24] I can just see the person who has his boats, his homes and his businesses seized—all allegedly the proceeds of and/or the facilitating agencies of a large drug distribution ring—claiming to be indigent and proving his claim by showing that the government has his assets and then being entitled to have his legal fees paid for by the government. How ironic! Need we wonder why the NACDL supported this proposal? Perhaps their real reason for protesting

---

20. *Review of Federal Asset Forfeiture Program: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 103d Cong., 1st Sess. 172-86 (1993) (statement of Nancy Hollander, Esq., on behalf of the National Association of Criminal Defense Lawyers) [hereinafter *House Hearings*].

21. *See* H.R. 2417 § 5 (amending 19 U.S.C. § 1608 to enable courts to appoint counsel for claimants who are "financially unable to obtain representation").

22. *See* 28 U.S.C. § 1915(d) (1988) (granting broad discretion to courts in determining whether to appoint counsel); Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (holding that the procedural due process right to appointed counsel is based on the particular facts and interests involved in a specific case and that the trial court should determine whether appointed counsel is appropriate after employing the balancing test in Mathews v. Eldridge, 424 U.S. 319 (1976)); Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986) (discussing factors for district court to consider in using its discretion to appoint counsel); Resek v. Alaska, 706 P.2d 288 (Alaska 1985) (holding that, although an indigent had no constitutional right to appointed counsel, the trial court had discretion to appoint one, if necessary, to protect a claimant's constitutional rights); *see also* SMITH, *supra* note 6, ¶ 11.02 (discussing the right to counsel in civil forfeiture cases).

23. H.R. 2417 § 5.

24. *See id.*

asset seizure and forfeiture use is that our courts have held that illegally obtained money that is used to pay attorneys' fees may also be seized.[25] One of the major points the NACDL makes is that attorneys' fees must be exempt from forfeiture, even in cases in which the organization believes that forfeiture is warranted and/or justified.[26] In an era when the public outcry is for less government spending, Congressman Hyde's proposal could cost the taxpayers millions. It could, however, have one other effect—on unemployment. Maybe we could call it "The Lawyers Full-Employment Act."

Another issue under attack is the cost bond requirement.[27] Obviously, Congress recognized the need to deter frivolous claims and in fact increased the amount of the bond on two separate occasions in the 1980s.[28] Given that cases are strong and the law enforcement success rate very high, why should we give organized crime groups a free shot at the government? The taxpayers ultimately would pay for frivolous claims brought by those having nothing to lose by filing such claims, which would clog our already overburdened court calendars. I know of no cases in which someone was deprived of his or her day in court because he or she could not post a bond. In fact, both in law and in practice, a person claiming seized property can obtain a waiver of the bond provision if he or she can demonstrate indigence.[29] To assure that applications claiming indigence are given a fair review, Department of Justice policy, effective January 1993, requires that if the seizing agency believes that the claim of indigency is unfounded, that claim must be sent to the Executive Office

---

25. Caplin & Drysdale v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989) (both holding that the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853, did not allow a trial judge discretion to withhold the forfeited assets to pay bona fide attorneys' fees). *But see* N.Y. CIV. PRAC. L. & R. § 1311(12) (McKinney Supp. 1995) (the only state or federal statute allowing the exemption of attorneys' fees from forfeiture).

26. *See House Hearings, supra* note 20, at 183-84.

27. 19 U.S.C. § 1608 (1988 & Supp. V 1993) (requiring that an owner of seized property must post a bond in the amount of $5000 or 10% of the value of the claimed property within 20 days of the publication of the notice of seizure); *see also* SMITH, *supra* note 6, ¶ 6.02 (discussing the procedures for obtaining a judicial hearing, including the cost bond requirement in different forfeiture settings).

28. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1862(a), 100 Stat. 3207, 3207-54; Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 213(a)(5)(B), 98 Stat. 2948, 2985 (both amending the 19 U.S.C. § 1608 cost bond amount).

29. 19 C.F.R. § 162.47(e) (1994) (mandating that the bond requirement be waived for claimants who prove a "financial inability to post the bond"); *see* SMITH, *supra* note 6, ¶ 11.02 (describing procedures whereby an indigent can remove the cost bond requirement).

for Asset Forfeiture for a separate review.[30] If the claim is still denied, the claimant is given additional time to seek a judicial determination of indigency. The procedure also requires full notice and disclosure to claimants at all stages.[31]

As to some of the other issues addressed by the Hyde bill, I will just comment briefly because I believe the way to resolve the perceived problems is not through legislation but, rather, through some simple programmatic changes. The bill would lengthen the time claimants have to file a claim in certain *in rem* proceedings from ten to sixty days.[32] I would point out that one of the most frequent complaints defense lawyers make is the alleged delay on the part of prosecutors in moving these cases. Perhaps the time to file a claim should be the same as is given to answer any other civil action. This certainly can be worked out without great controversy.

Another provision would allow property owners to sue the federal government for negligence.[33] I seriously doubt that anyone wants to open the whole Pandora's box of cases that could be affected by such a provision. Do we apply it to IRS seizures of homes for back taxes?[34] Do we apply it to seizures for failure to repay student loans?[35] Do we apply it to seizures by the Federal Housing Administration for failure to pay mortgages?[36] Or worse yet, do we apply it to all government activity?[37]

---

30. Executive Office for Asset Forfeiture, U.S. Dep't of Justice, Directive 93-2, at 2 (Jan. 15, 1993) [hereinafter DOJ Directive 93-2]; *see also* Onwubiko v. United States, 969 F.2d 1392 (2d Cir. 1992) (setting aside an administrative forfeiture because the government should have known that the claimant was unable to afford the cost bond, despite his failure to make a claim of indigency).

31. *See* DOJ Directive 93-2, *supra* note 30, at 2.

32. H.R. 2417 § 3 (amending FED. R. CIV. P. C(6) (Supplemental Rules for Certain Admiralty and Maritime Claims)).

33. *Id.* § 2 (amending 28 U.S.C. 2680(c) (1988 & Supp. V 1993)).

34. *See* 26 U.S.C. §§ 7321-7327 (1988) (describing the procedures whereby the Internal Revenue Service can seize property, and remaining silent on the issue of actions alleging negligently handled forfeitures).

35. Higher Education Act, 20 U.S.C. §§ 1071-1089 (1988) (discussing the general provision for student loans as well as the default provision, but listing no right of action against the government for negligence).

36. *See* National Housing Act, 12 U.S.C. §§ 1707 *et seq.* (1988 & Supp. V 1993) (describing the mortgage insurance powers and responsibilities of the Federal Housing Administration, but listing no right of action against the government for negligence); *see also* Federal Home Loan Mortgage Corporation Act, 12 U.S.C. §§ 1451-1459 (1988 & Supp. V 1993) (not providing for a right of action against the government for negligence in foreclosure proceedings); Emergency Mortgage Relief Act, 12 U.S.C. §§ 2701-2712 (1988 & Supp. V 1993) (same).

I submit that there is nothing in the law of asset seizure and forfeiture that would justify this legislation.

The briefing paper used to support Congressman Hyde's bill contains a specific section dealing with adoptive forfeitures.[38] This paper cites such "unbiased" sources of information as the much-criticized *Pittsburgh Press* series[39] and the general counsel of Forfeiture Endangers American Rights,[40] the organization whose purpose, among others, is to destroy law enforcement's ability to seize assets. It states, without authority, that "[a]doptive forfeiture is often relied upon to circumvent state laws allocating forfeited assets to non-law enforcement uses."[41] I submit, based on my discussions with prosecutors and law enforcement officers

---

37. *See* Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2402, 2671 *et seq.* (1988 & Supp. V 1993) (setting up a general scheme of federal tort liability with specific exceptions for particular governmental acts). Not all tort claims against the government fall within the Federal Tort Claims Act; § 2680 sets forth the exceptions to liability and § 2780(c) provides an exception for "law enforcement" activities. H.R. 2417 would amend this law enforcement exception to allow negligence suits against those law enforcement officers who may have destroyed, injured or lost property that has been forfeited. Other claims against the government are possible besides those under the Federal Tort Claims Act. Specific statutes contain special waivers of governmental immunity. *See, e.g.*, 42 U.S.C. § 2000e-16 (1988 & Supp. V 1993) (Title VII) (providing a right of action against the government for employment discrimination). No such waivers exist in the current forfeiture laws.

38. HENRY HYDE, CIVIL ASSET FORFEITURE REFORM ACT OF 1993: A BRIEFING PAPER 12-13 (1993). Adoptive forfeiture is another name for the program the Department of Justice calls equitable sharing. In some instances a state or local seizure under state law qualifies for a federal forfeiture. The state agency transfers the seized property to the federal seizing agency, and the federal agency "adopts" the state seizure. After the federal forfeiture, the United States government often returns 85% of the net proceeds of the forfeiture to the state or local agency that seized the property. *See* SMITH, *supra* note 6, ¶ 7.02; Executive Office for Asset Forfeiture, U.S. Dep't of Justice, Directive 93-1 (Jan. 15, 1993) (explaining the general adoption policy and procedure); *see also* 1993 ANNUAL REPORT, *supra* note 2, at 18-19 (discussing the program and its proceeds received by local and state agencies).

39. Andrew Schneider & Mary P. Flaherty, *Forfeiture Threatens Constitutional Rights*, PITT. PRESS, Aug. 16, 1991, at A1; Andrew Schneider & Mary P. Flaherty, *Crimes Are Small, but 'Justice' Takes It All*, PITT. PRESS, Aug. 15, 1991, at A1; Andrew Schneider & Mary P. Flaherty, *Crime Pays Big for Informants in Forfeitures*, PITT. PRESS, Aug. 14, 1991, at A1; Andrew Schneider & Mary P. Flaherty, *Police Profit by Seizing Homes of Innocent*, PITT. PRESS, Aug. 13, 1991, at A1; Andrew Schneider & Mary P. Flaherty, *Drug Agents Far More Likely to Stop Minorities*, PITT. PRESS, Aug. 12, 1991, at A1; Andrew Schneider & Mary P. Flaherty, *Government Seizures Victimize Innocent*, PITT. PRESS, Aug. 11, 1991, at A1.

40. HYDE, *supra* note 38, at 2-3 & n.4.

41. *Id.* at 13.

around the country, that there are two primary reasons for adoptive forfeitures: poorly written state laws that allow criminals to escape the purview of the law, and a lack of funding that hinders local law enforcement agencies' ability to handle forfeiture cases.

The briefing paper goes on to state that, as a result of Hyde's bill, named the Civil Asset Forfeiture Reform Act, the government would have a rougher time in federal courts.[42] Consequently, state officials would decide to stick with their state courts. Therefore, more money would be available for education, drug treatment and other services that are paid for by forfeiture under state laws.[43] I submit that this statement is fallacious. In fact, what would happen is that far less money would be available to everyone because many state statutes are less comprehensive than the federal law. Sophisticated criminals would merely take their assets outside the jurisdiction of the state courts.

While on the subject of the money from forfeitures, it is important to look at where the money really goes. From 1985 to the present, the Department of Justice transferred approximately $1.2 billion to over 3000 state and local law enforcement agencies; $540 million has been used for prison and jail construction, $400 million has gone for federal investigative and prosecutorial expenses, and $281 million has gone to the Office of National Drug Control Policy, whose budget Congress controls and from which Congress has allocated $52.7 million for drug treatment.[44] With these monies, state and local officials have built and expanded training facilities for police and prosecutors, have built and expanded forensic laboratory facilities, and have begun or expanded community-based programs in drug abuse education, drug abuse prevention and drug treatment.[45] In many cases, prosecutors across this country were the ones who expanded the traditional definition of "law enforcement purposes" to allow such programs to be funded—ironically, by the very people at the root of the problem—without added cost to taxpayers.[46]

---

42. *Id.*

43. *Id.*

44. *House Hearings*, *supra* note 20, at 79-80 (statement of Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture).

45. *See* EXECUTIVE OFFICE FOR ASSET FORFEITURE, DEP'T OF JUSTICE, HIGHLIGHTS OF THE FEDERAL ASSET FORFEITURE PROGRAM 45-60 (1994) (describing several of the projects that proceeds from the asset forfeiture program have funded); *Asset Forfeiture Can Be a Source of Funds for Prevention, Treatment*, SUBSTANCE ABUSE FUNDING NEWS, Dec. 23, 1993, at 1.

46. *See* AMERICAN PROSECUTORS RESEARCH INST. & NAT'L DRUG PROSECUTION CTR., BEYOND CONVICTIONS: PROSECUTORS AS COMMUNITY LEADERS IN THE WAR ON DRUGS—AN OVERVIEW OF PROSECUTOR-LED PROGRAMS IN EDUCATION, PREVENTION, TREATMENT, AND ENFORCEMENT 362-66 (1993) (describing a prosecutor's role in the

Doing away with law enforcement's ability to use asset forfeiture, or severely limiting this use, would have a devastating effect on one other group: the forgotten, the victims. I'm not sure that we are even able to calculate the millions of dollars that we have been able to use as restitution to victims of crime *solely* because we had the ability to freeze, seize, and eventually forfeit the assets of criminals involved in a wide range of activities. Check with the State of Georgia Department of Medical Assistance, or the City of Bristol, Virginia, or the victims of the many corporate or telemarketing frauds, or the thousands of others who would have lost everything had it not been for the ability of law enforcement to seize and forfeit assets. I'm sure we all know how they feel about the law.

I believe all we need do is look at the alternatives to see how well asset seizure and forfeiture has worked. We have beaten the subject of incarceration to death. On the one hand are those who claim it is too expensive;[47] on the other are those who say the sentences are too long,[48] and then there is the public which usually says the sentences are too short. Not only is incarceration expensive, but it does nothing to attack the economic foundations of crime.[49] *Forfeiture does.* Fines are largely ineffective because they are not or cannot be enforced. Take the case of the fugitive or a person who resides outside our borders. Consider that "defendants charged with drug offenses and released before trial are less likely to appear for trial than other released defendants"[50] and that "in the 75 largest urban counties in 1988, felony drug defendants also were more likely than other defendants to remain fugitives for more than

---

Anti-Racketeering Fund Grant Program in Arizona).

47. *See* JAY S. ALBANESE, MYTHS & REALITIES OF CRIME AND JUSTICE 165-72 (3d ed. 1990) (criticizing the expense of incarceration on state budgets and society as a whole); Patrick J. Fiedler, *The Wisconsin Department of Corrections: An Expensive Proposition*, 76 MARQ. L. REV. 501 (1993); Jeff Potts, *American Penal Institutions and Two Alternatives for Punishment*, 34 S. TEX. L. REV. 443 (1993) (arguing that the high cost of prisons and incarceration is a reason for alternatives to imprisonment).

48. *See* Lawrence Crocker, *The Upper Limits of Just Punishment*, 41 EMORY L.J. 1059 (1992) (discussing the excessive length of prison terms and their lack of uniformity for similar crimes). For commentary on sentencing and prison terms, see JOHN J. DIIULIO, JR., NO ESCAPE—THE FUTURE OF AMERICAN CORRECTIONS (1991); MAEVE W. MCMAHON, THE PERSISTENT PRISON: RETHINKING DECARCERATION AND PENAL REFORM (1992); DISCRETION IN CRIMINAL JUSTICE (Lloyd E. Ohlin & Frank Remington eds., 1993).

49. *See* Jaipaul, *supra* note 2, at 176-77; 1993 ANNUAL REPORT, *supra* note 2, at 1.

50. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS, CRIME, AND THE JUSTICE SYSTEM 169 (1992).

1 year after failing to make an appearance."[51] Fines can only be collected on what the government can find, and despite great efforts, the six percent overall collection rate in federal courts is dismal.[52] With forfeiture, we freeze or seize the assets at the beginning of the process and have them available. Without asset forfeiture, we would be virtually powerless to stop the flow of illegal monies from the United States to foreign drug cartels or other criminal organizations. Forfeiture gives us the ability to attack the financial base of crime on a global scale.

On the matter of deterrence, I have only to think back to a fourteen-year-old former drug dealer, with whom I gave a drug presentation to a series of high school classes. When asked by the students why he was not dealing anymore, he mentioned in passing that he had been arrested and sent to a juvenile facility. He went on at great length to discuss all of the goods he had amassed from his drug dealing profits. "But," he concluded, "look at me now, I've got nothing, the cops took it all, it's just not worth it." I know from speaking to other prosecutors that they have had similar experiences and that this is a thought in many criminals' minds: because of asset seizure and forfeiture laws, "it's just not worth it."

Despite the fact that the concept of forfeiture is centuries old,[53] we are really only in the infancy of the use of modern forfeiture. Law enforcement officers and prosecutors are still learning the system. Yet despite this, we have made great strides. At the same time we have made some mistakes. When you look at the statistics, the Department of Justice indicates that there have been approximately fifty complaints in some 175,000 federal forfeitures,[54] and, in a study in New Jersey, there were fifteen complaints in some 12,000 cases.[55] I doubt many other professions—the law, medicine or even the media—can claim a better success rate. However, this is still not good enough. Law enforcement is constantly striving to do better. Both the Department of Justice and the National District Attorneys Association have recently promulgated

---

51. *Id.* at 170.

52. *House Hearings, supra* note 20, at 76 (statement of Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture).

53. *See* Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 29-30 (1994); Walter J. Van Eck, *The New Oregon Civil Forfeiture Law*, 26 WILLAMETTE L. REV. 449, 449-54 (1990).

54. *House Hearings, supra* note 20, at 88 (testimony of Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture).

55. Robert Del Tufo, *Forfeiture Law Insures "Crime Doesn't Pay"*, statement delivered to the President's Commission on Model State Drug Laws 6 (Feb. 16, 1993) (on file with the *New York Law School Law Review*).

Guidelines for Asset Forfeiture.[56] In January 1993, the Department of Justice instituted, in addition to those reforms already mentioned, a series of reforms concerning a number of the areas of past controversy, including expedited notice to owners of seized property, expedited payments to innocent lienholders, and new requirements for adopted seizures.[57] In the spring of 1994, the Department of Justice proposed its own forfeiture reform act, the Forfeiture Act of 1994.[58] This proposed forfeiture act would greatly expand the scope of forfeiture, giving the government more powerful investigative tools and narrowing the statutory innocent owner defense.[59] While it does not endorse the reforms put forth in the Hyde bill, it would heighten the government's standard of proof from probable cause to preponderance of the evidence.[60] The proposed act would also permit the free use of grand jury material by government attorneys in all civil forfeiture cases and would authorize prosecutors to issue civil investigative demands to compel testimony and the production of evidence in potential civil forfeiture cases without requiring any level of suspicion that the information may lead to a forfeiture.[61]

The Department of Justice, prosecutors and law enforcement agencies across the nation are continually expanding their training programs for prosecutors and law enforcement personnel. Hundreds of asset forfeiture training programs are given by U.S. Attorneys, the FBI and DEA, state and local police agencies, Department of Justice-funded organizations, such as the American Prosecutor's Research Institute's National Drug Prosecution Center, and the Police Executive Research Forum. In addition to these, the Executive Office for Asset Forfeiture has produced a three-level course on asset forfeiture for all prosecutors and law enforcement officers nationwide.[62] This course was produced through the efforts of the State and Local Law Enforcement Asset Forfeiture

---

56. *See* DOJ Directive 93-4, *supra* note 6; DOJ Directive 93-2, *supra* note 30; NATIONAL DIST. ATT'YS ASS'N, *supra* note 1; NATIONAL DIST. ATT'YS ASS'N, NATIONAL CODE OF PROFESSIONAL CONDUCT FOR ASSET FORFEITURE (1993).

57. *See* Executive Office for Asset Forfeiture, U.S. Dep't of Justice, Directive 93-3 (Jan. 15, 1993); DOJ Directive 93-4, *supra* note 6.

58. *See* SMITH, *supra* note 6, ¶ 1.02 (Supp. 1994).

59. *See id.*

60. *See id.*

61. *See id.*

62. The National District Attorneys Association (NDAA), with funding from the Department of Justice, brought together experts from across the country to develop the curriculum for this course. This group was known as the State and Local Law Enforcement Asset Forfeiture Training Working Group. The course material developed by this project is on file with the NDAA in Alexandria, Virginia.

Training Working Group, which consists of representatives of all of the major state and local prosecutor, attorney general, police and sheriff's organizations in the country. The primary mission of the group was to develop a core curriculum on asset forfeiture issues and ethical standards for the use of asset forfeiture by police and prosecutors.[63]

It seems, however, much of this information is not getting to the appropriate people. Therefore, I suggest that before proceeding any further, Congressman Hyde and Congressman Conyers bring their fears to a meeting of the Department of Justice's Executive Working Group, which has representatives of the Department of Justice, the National District Attorneys Association, National Association of Attorneys General, and other law enforcement agencies. Together, we may be able to reach a consensus on the future of one of the most important crime fighting tools in America's arsenal. I believe that any existing problems are programmatic in nature and do not require more legislation. Fair-minded people can sit down and work out this situation.

63. *See* State and Local Law Enforcement Asset Forfeiture Training Working Group, Mission Statement (1993) (on file with the *New York Law School Law Review*).